RECENT CASES.

BANKS AND BANKING—LIABILITY FOR PAYMENT TO ONE OTHER THAN DEPOSITOR—NEGLIGENCE.—X was a depositor in a savings bank. Y stole his deposit book, went to the bank and, representing himself as X, asked for the amount of the deposit. The bank was not certain as to Y's identity, though he satisfied most of the tests, so by way of precaution, it gave him a check on the teller of the N bank, who indorsed it to X and handed it to Y. Being identified as X, he succeeded in getting the plaintiff to cash the check. Plaintiff deposited it with the O bank, which obtained payment from the N bank; but, upon the forgery being discovered, the N bank recovered the money from the O bank, and the latter from plaintiff, who thereupon brought this action of tort for negligence against the savings bank. Judgment was given for the defendant, Gallo v. Brooklyn Savings Bank, 92 N. E. 633 (N. Y. 1910).

This case presents a novel situation, not only in its facts but also in the action by which the plaintiff sought to recover. However, there seems to be no inherent objection to suing in tort under such circumstances; and while the conclusion reached by the Court of Appeals is probably correct, it is submitted that considerable might be said for the view taken by the appellate division, whose judgment in favor of the plaintiff was reversed.

BILLS AND NOTES—NEGOTIABLE INSTRUMENTS LAW—LIABILITY UPON AN INCOMPLETED INSTRUMENT, STOLEN BEFORE DELIVERY.—The decision in Linick v. A. J. Nutting Co., 125 N. Y. Supp. 93 (N. Y. Sup. Ct. 1910), involves Secs. 15 and 16 of the Negotiable Instruments Law, Secs. 34 and 35 of the N. Y. Act. A stole a blank check signed by the plaintiff, filled it out to a third person as payee and had it certified at the plaintiff's bank. The defendant became a *bona fide* holder for value, the payee's endorsement being forged, and collected from the bank. The plaintiff sued defendant for money had and received to the amount of the check. *Held*, by a divided court, that the signer is not liable to a *bona fide* holder for value on a blank check stolen and completed by the thief. Negotiable Instruments Law, Sec. 16 (Sec. 35, N. Y. Act), providing, "Where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed," must be read in connection with Sec. 15 (Sec. 34, N. Y. Act), declaring that "Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery."

The decision is based on Baxendale v. Bennett, L. R. 3, Q. B. D. 525 (1878), and Burson v. Huntington, 21 Mich. 416 (1870). In the English case the defendant had written his name as acceptor upon stamped paper. It was taken from his desk, filled up, and transferred to plaintiff as a *bona fide* holder for value. The court held the defendant was not liable. This seems to be the only reported case of an incomplete instrument stolen before delivery. But none of the judges in the Court of Appeals based their decision on the fact that the instrument was incomplete. The distinction made is between an instrument stolen before delivery and one stolen after a delivery by the maker. Cases of the latter class are numerous, and in all the maker is held liable. Raphael v. Bank of England, 17 C. B. 162 (1855); Murray v. Lardner, 2 Wall. 110 (U. S. Sup. Ct. 1864); Seybel v. Bank, 54 N. Y. 288 (1873); Bank v. Chapman, 123 S. W. 641 (Tenn. 1909). In Burston v. Huntington, *supra*, a completed note was stolen by the payee and transferred to

an innocent holder for value, and delivery by the maker was held necessary to create liability. Though followed by some states before the act, Roberts v. McGrath, 38 Wis. 52 (1875); Salley v. Terrill, 50 Atl. 896 (Me. 1901), the weight of authority was against Burson v. Huntington, *supra*. Worcester Co. Bank v. Darchester Bank, 57 Am. Dec. 120 (Mass. 1852); Clarke v. Johnson, 54 Ill. 296 (1870); Kinyon v. Wohlford, 17 Minn. 239 (1871); Poess v. Bank, 86 N. Y. Supp. 857 (1904). The specific language of Sec. 16 was intended to establish the law in favor of holders in due course, and this conclusive presumption exists as well when the note is taken from a thief as in any other case. Massachusetts National Bank v. Snow, 72 N. E. 959 (Mass. 1905). In the case last cited, Knowlton, C. J., speaking for the court, says: "Of course, this rule does not apply to an instrument which is incomplete." This dictum is the only authority on the question raised in the principal case.

It is submitted that there is no valid reason for different rules where the instrument is complete or incomplete. On the grounds of negligence, public policy, and the well-settled rule that where a loss must fall upon one of two innocent parties, it should fall upon the one whose act opened the door for it to enter. Section 15 of the American law does not appear in the English Bills of Exchange Act.

CARRIERS—DAMAGES FOR DISCRIMINATION IN FURNISHING CARS.—In an action by a coal company against a railroad to recover damages for alleged illegal discrimination in furnishing transportation facilities, the measure of damages was held to be the reasonably fair profit on the probable output of the mine, less what was actually shipped from the mine. Hillsdale Coke & Coal Co. v. Pennsylvania R. R. Co., 229 Pa. 61 (1910).

A dissenting opinion was based on the fact that the coal which had not been mined, owing to the defendant's failure to supply cars for its shipment, still remained in the mine, and would, of course, be marketed at a future time. The measure of damages, it was argued, ought therefore to be the difference between the profits actually, or likely to be, realized by a future mining and sale, and what the profits would have been had the coal been mined at the time the plaintiffs were prepared to put it on the market.

Jurisdictions differ as to whether the profits of a business are recoverable as damages. The earlier Pennsylvania decisions held that profits are speculative and uncertain to an extent which precludes their recovery, unless they would have been the direct and immediate fruits of a contract between the parties, and thus have been stipulated for and within the contemplation of the parties at the time the contract was made. Adams Express Co. v. Egbert, 36 Pa. 360 (1860); Watterson v. Allegheny Valley Railroad Co., 74 Pa. 208 (1873). The better view seems to be, even where profits are considered speculative in general, that there is this notable exception to the rule: The loss of profits from the destruction or interruption of an established business may be recovered where the plaintiff makes it reasonably certain by competent proof, the amount of his actual loss. Central Coal Co. v. Hartman, 111 Fed. 96 (1901).

Other courts do not hesitate to consider profits an element of recoverable damages. So it has been held that in case of delayed transportation, the plaintiff may recover the difference between the market price when the goods are delivered at their destination, and the market price when they should have been delivered there, together with damages for deterioration in the value of the goods. Moore on Carriers, 410, and the authorities there cited. Where a carrier refuses or fails to carry the goods tendered by a shipper, the measure of damages is, in most jurisdictions, the difference between the value of the goods at the time they were to have been delivered at the point of destination, and the value of goods of the same quality, at the same time at the place of shipment, together with interest from that time, less cost of transportation. Moore on Carriers, 417, and cases cited; Hutch. Carr., Sec. 774; Sedg. Dam. Sec. 842.

In all these cases it will be noted that the goods proffered for shipment

were specified and limited in quantity, and the failure to furnish transportation affected them only. It is, therefore, proper that the courts remember, in assessing damages, that the goods remain in existence, and do not allow the entire profits accruing from the sale of the goods. In the principal cases, the commodity was coal, the supply of which was, within the contemplation of the litigants concerned, unlimited. Such being the case, any cessation of mining operations was an absolute loss to the income of the present mine owners, and it is only fair that they be allowed the full profits of which they were deprived. The Interstate Commerce Commission has adopted the rule of the principal case in Glade Co. v. B. & O. R. R., 10 I. C. R. 226 (1904); Eaton v. C. H. & D. Ry., 11 I. C. R. 619 (1906).

In weighing the recent decision of the Pennsylvania Supreme Court, it must be observed that the plaintiff claimed under the Act of June 4, 1883, P. L. 72, which forbids discrimination and subjects offenders to treble damages. The act is, on its face, intended to be deterrent, and its damages are punitive. To adopt the rule advocated in the dissenting opinion would entirely prevent the act from producing the result which the legislature must have intended. Not only would the damages be highly speculative, but they would be so trivial as to have no restraining influence on defendants whose inclinations and interests invite a disregard of the provisions of the act.

The decision is locally interesting as showing the abandonment by the Pennsylvania courts of the position that profits can never, in the absence of a specific contract in which they are contemplated, be awarded as damages.

CHOSE IN ACTION—PARTIAL ASSIGNMENT OF AN EXISTING DEBT—ENGLISH JUDICATURE ACT OF 1873.—The case of Forster v. Baker, 2 K. B. 636 (1910), is interesting as presenting a point hitherto unsettled in English law: Is the partial assignment of a chose in action a legally valid transfer? The facts were that one Bowles recovered a judgment against Baker for £675. He assigned by indenture to Forster £560 thereof "absolutely," with due notice to Baker. In a special case to try the issue whether Forster was entitled to leave to issue execution under the rules of court, order xlii, v. 23: *Held*, that the partial assignee was not entitled to such leave.

The plaintiff sought to enforce his claim under Sec. 25, Sub-sec. 6, of the Judicature Act of 1873: "Any absolute assignment by writing * * * of any debt or other legal chose in action of which express notice shall have been given to the debtor * * * shall be effectual in law * * * to pass and transfer * * * all legal remedies for the same * * * without the concurrence of the assignor."

Bray, J., in the lower court interpreted the statute strictly, and as it made no mention of partial assignments, refused to allow the action. In affirming his decision, the Court of Appeals avoided the question of statutory construction altogether, and explained their stand on the ancient principle that out of one judgment there shall be but one execution. This decision must be taken to overrule Tucker v. Howard, 1 K. B. 91 (1910) (discussed 58 U. of P. Law Rev., p. 505), the only authority upon the point at issue. In fact, Bray, J., considered the case as one of no importance, being unsound in principle, and at best, but a *nisi prius* case.

By the common law of England a chose in action was not assignable. II Bl. H. Com. Sec. 442, Liveridge v. Broadbent, 4 H. & N. 602 (1859), though the beneficial application of the rule has been doubted in some instances. Masters v. Miller, 4 T. R. 320, at p. 340. In equity, however, from the earliest times choses in action have been assignable, IV Halsbury's Laws of Eng. 374, on the theory that the title of the assignee of the debt was property—an asset capable of being dealt with as any other asset. Fitzroy v. Cave, 2 K. B. (1905) 364. The section of the Judicature Act referred to enables an assignee to sue in his own name in cases where previously he could have sued in the assignor's name, but only where he could so sue. Marchant v. Morton Down & Co., 2 K. B. (1901), p. 632, nor has it made assignable contracts that were not assignable in equity before. Tolhurst v.

Cement Co., A. C. (1903), at p. 424. Prior to the act the assignee was, however, compelled to join the assignor. Cathcart v. Lewis, 1 Kes., Jr. 463 (1792). "In a suit in equity the assignee of a debt, even where the assignment was absolute on the face of it, had to make his assignor, the original creditor, a party in order to bind him and prevent a suit by him at law, and also to allow him to dispute the assignment if he saw fit." Chitty, L. J., in Durham Bros. v. Robertson, 1 Q. B. (1898), at p. 769. It is obvious that the same reasoning would require a joinder of the parties in the case of a partial assignment, but it does not appear from the cases that prior to the act the English courts ever recognized the rights of a partial assignee suing in his own right. The few English cases since the act have tended to answer the question negatively. Brice v. Banister, 3 Q. B. D. 569 (1878), was broad enough to support the proposition that a portion of a debt could not be assigned, but this case has since been generally doubted. Durham Bros. v. Robertson, *supra*. Jones v. Humphries, 1 K. B. (1902) 10. Hughes v. Pump House Co., 2 K. B. (1902) 190. The case under discussion, therefore, seems squarely within the established principles of English law, as well as in accord with the trend of the meagre authority existing. This decision also seems logically correct. No mention being made of partial assignments in the act, it must be inferred that the intent of the legislature was to exclude them. Moreover, admitted that the great objection to partial assignments has always been that it subjected the debtor to more than one suit—the application of the act would not avail, for its purpose was to do away with the joinder of assignee and assignor. Nor can the theory that the assignment is virtually a power of attorney to sue at law in the assignor's name afford a satisfactory explanation, for the assignor himself has the right to sue but once, and therefore cannot give any greater power to an assignee than he himself has. Viewed from all standpoints, then, it is now the law of England that a partial assignee cannot sue in his own right, even under the Judicature Act.

In this country the opinion seems universal that the partial assignee acquires no rights enforceable at law. Mandeville v. Welsh, 5 Wheat. 277 (1820), per Story, J., and Ry. v. Volkert, 58 Ohio St. 362 (1898), but he is generally allowed to pursue his rights in equity. James v. Newton, 142 Mass. 366 (1886). (Note review of authorities in this case.) Otis v. Adams, 56 N. J. L. 38 (1893). In Appeals of City of Phila., 86 Pa. 179 (1878), this doctrine was admitted, but the court refused to extend it where the debtor was a municipal corporation (appropriation of councils), on the ground that the policy of the law is against permitting individuals, by their private contracts, to embarrass the officers of a municipality. Followed and approved: Geist's Appeal, 104 Pa. 351 (1883). The reason for allowing a partial assignee to recover in equity is simple and convincing: "The objection that the debtor would be inconvenienced by partial assignments, while apparent if he could be pursued by each assignee separately upon his portion of the claim, is entirely wanting where the parties may all be brought before the court in one proceeding and their rights all settled in one decree." Ry. v. Volkert, *supra*, p. 370. The only authority *contra* is in Missouri, where the court proceeds on the theory that the debtor's consent is essential, otherwise no limit could be put to the extending of the rights of partial assignees. Burnett v. Crandall, 63 Mo. 410 (1876). The mass of authority, therefore, seems in accord with the decision in Forster v. Baker, *supra*.

Statutes similar in scope and effect to the English Judicature Act, sup. have been passed in many of our states. Among others are Maine R. S. c 82, Sec. 130, which gives the assignee a right of action in his own name, provided he files a copy of the assignment. 91 Me. 338; Colorado, Laws of '97, p. 98, Sec. 16; Iowa Code, 1897, Sec. 3459, see Roberts v. Corbin, 26 Iowa, p. 325; New York, Wait's Code, Sec. 111, p. 111, and Parson's 1909 Code, Sec. 449 (amendment 1877); New Jersey, 1890, P. L. p. 24. All of these statutes give the assignee of a chose in action the right to sue at law in his name. In none of them are the rights of a partial assignee recognized or even mentioned. No case has been found in any jurisdiction recognizing the rights of a partial assignee to sue in his own name at law. In at least one case the attempt was

made to enforce such a right under one of the statutes mentioned and distinctly denied by the court. Otis v. Adams, *supra* (N. J.). Under the authorities noted, therefore, it does not seem to be assuming too much to say that it is general law in both England and this country that the partial assignee of a chose in action cannot sue in his own right.

CONFLICT OF LAWS—MARRIAGE.—Appellant and decedent, residents of Minneapolis, had been married in Germany, and, in settling decedent's estate, the validity of the marriage was questioned. *Held*, that its validity should be determined by the German code. *In re* Landis' Est. 127 N. W. 1125 (Minn. 1910).

The general rule is that the validity of a marriage is to be determined by the law of the place where the ceremony is performed. A marriage legal where solemnized is valid everywhere. Stull's Est. 183 Pa. 625 (1898); Clark v. Clark, 52 N. J. Eq. 650 (1894). But there are numerous exceptions, which can be divided into two classes: (1) Marriages deemed contrary to the law of nature, and these are either incestuous or polygamous; (2) Marriages which legislatures have declared invalid because contrary to the policy of the laws, morals or municipal institutions. Comm. v. Lane, 113 Mass. 458 (1873).

Marriages in the direct lineal line of consanguinity, and those contracted between brother and sister are generally held to be incestuous. Sutton v. Warren, 51 Mass. 451 (1845). And, consequently, the intermarriage of a man with his mother's sister is included under the general rule. Sutton v. Warren, *supra; contra*, State v. Brown, 47 Ohio, 102 (1890); U. S. v. Rodgers, 109 Fed. 886 (1901); and likewise marriages between first cousins. Comm. v. Isaacman, 16 D. R. 18 (1906); Garcia v. Garcia, 127 N. W. 586 (S. D. 1910); *contra*, Johnson v. Johnson, 106 Pac. 500 (Wash. 1910). But as in each of the above cases the marriage was unlawful in the state of domicile, it was immaterial which law applied.

The general rule does not prevail over a statute prohibiting the marriage of the guilty person in a divorce for adultery, with the adulterer or adulteress. Stull's Est., *supra;* Pennegar v. State, 87 Tenn. 244 (1889); or over one prohibiting the guilty party from marrying at all. Williams v. Oates, 5 Iredell, 535 (N. C. 1845); Lanham v. Lanham, 136 Wis. 360 (1908); *contra*, Van Voorhis v. Brintnall, 86 N. Y. 18 (1881); Com. v. Lane, *supra*.

Whether it overrides a statute prohibiting intermarriage between negroes and white persons seems to depend upon the policy of the particular state. In Louisiana such a marriage was declared void, the court remarking: "We prefer to pass the details of this record in silence." Dupre v. Bonlard's Ex. 10 La. Ann. 411 (1855); *contra*, State v. Ross, 76 N. C. 242 (1877); Medway v. Needham, 16 Mass. 157 (1819). But a marriage entered into with a person *non compos mentis* is governed by the *lex loci*. True v. Ranney, 21 N. H. 52 (1850).

In England the courts have construed statutes prohibiting certain kinds of marriages, as imposing a personal incapacity upon all coming within their provisions, and have held such marriages to be void, regardless of the law of the place where they were solemnized. Sussex Peerage Case, 11 Clark & F. 85 (1844); Brook v. Brook, 9 H. L. Cases, 194 (1861).

DAMAGES—PROPERTY RIGHT IN CORPSE.—In Miner v. Canadian Pacific Rwy. Co., 15 L. R. West Can. 161, Aug. 8, 1910, the plaintiff, the mother and executrix of the deceased, shipped his body by defendant's railway. The body was put off the train at the wrong station and did not arrive at its proper destination until a day later, thus occasioning expense by postponement of the funeral, etc., *held:* that the doctrine accepted in English law that there can be no property in a corpse does not rest upon a sound foundation and is not sustainable as a general proposition. The law recognizes property in a corpse but property subject to a trust. The courts will give appropriate remedies against interference with the right of custody, possession and control of a corpse awaiting burial, presupposing a right

of property therein subject to the obligations of proper care and decent burial. The decision contains an interesting summary of the English law on the subject.

The theory that there is no property in a corpse is due largely to the ecclesiastical authority over burial in England. One of the earliest references to it is in Coke's Institutes, Vol. III 203. "The burial of the cadaver, that is *caro data vermibus, is nullius in bonis.*" See also Blackstone Bk. II, 429.

The most important decision in the United States is the report of the referee in the widening of Beekman St., 4 Bradl. 503 (1857) where the English law is carefully considered and thought inapplicable to our conditions. Much of the apparent difficulty of this subject arises from a false and useless assumption, in holding that nothing is property that has not a pecuniary value. The real question is not of the disposable, marketable value of a corpse, or its remains, as an article of traffic but it is of the sacred and inherent right to its custody in order decently to bury it and secure its indisturbed repose.

Following this idea, the courts have generally held that there is a right in a corpse but it is not a definite property right. "While it may be true still that a dead body is not property in the common commercial sense of that term, yet those who are entitled to the possession and custody of it for purposes of decent burial have certain legal rights to it which the law recognizes and will protect." Larson v. Phase, 10 Minn., 307 (1891). Neighbors v. Neighbors, 23 Ky. L. R. 1433 (1901). But see Griffith v. R. R., 23 S. S. 25, (1884) where in an action by an administrator for injury to the body of his intestate, it was held that the right to recovery was analogous to real estate; if any existed, it passed to his heirs.

It is well settled that for an injury to the body after burial, the owner of the lot may bring trespass *q. c. f.* Meagher v. Driscoll, 99 Mass. 281 (1868). It has been held that although there was no property right in a corpse, a relative though not the owner of the soil was authorized in invoking protection against a desecration of a place of burial. Page v. Lymonds, 63 N. H. 17 (1883). But see Guthrie v. Weaver, 1 Mo. App. 136 (1876); Wynkoop v. Wynkoop, 42 Pa. 239 (1893). The right ceases with burial.

Where a dispute arises between relatives as to the body, it is generally held that there is no property right and the case is usually settled according to the justice of the situation. Pettigrew v. Pettigrew, 207 Pa. 313 (1904); Weld v. Walker, 330 Mass. 422 (1881); Hadsell v. Hadsell, 7 Ohio Circ. 196 (1893). Replevin will not lie for a corpse. Guthrie v. Weaver, *supra;* Keys v. Konkel, 119 Mich. 550 (1899).

Several cases in which the principles involved have been the same as in our principal case have arisen in this country and recovery has been allowed. "The courts which declare the right to recover for mental anguish in a case of this character do so upon the assumption that a human corpse is property; not property in the general acceptation of that term but a *quasi* property—that is it so resembles property in the right of relatives to control and direct its interment and to have it kept inviolate from negligence or malicious injury that the law of the rights of property and the remedy for the destruction thereof should be extended to such cases, measuring the injury and compensation by the mental suffering of the living occasioned by the destruction of the dead." Long v. Chicago, etc., Rwy. Co., 15 Okl. 512 (1905). *Accord:* Beam v. Cleveland, C. C. & St. L. Rwy., 97 Ill. App. 24, (1901); Kyles v. Southern Rwy., 147 N. C. 394 (1908); Lindle v. Gt. North. Rwy., 99 Minn. 408 (1906); Wright v. Hollywood Cemetery, 112 Ga. 884 (1900); Bumey v. Hospital, 169 Mass. 571 (1897).

For an interesting discussion of the general subject see 19 Am. Law Rev. 251. For an exhaustive collection of authorities see 18 Abb. New. Cas. 76.

DECEIT—RESCISSION OF CONTRACT FOR MISREPRESENTATIONS—MADE THROUGH MERCANTILE AGENCY.—The appellant in Davis v. Louisville Trust Co., 181 Fed. 10 (1910) purchased fifty shares of stock in the defendant corporation relying on a report furnished by its president to a mercantile

agency. The statements contained in the report in regard to the capital stock and business of the corporation were materially false and the purchaser sought to rescind the contract. *Held:* The report must be considered as addressed to any person to whom it should be furnished by the mercantile agency, in the regular course of business, or to whom it might rightfully be communicated either as a basis for credit or for investment in the stock of the corporation and that statements therein constituting false and fraudulent representations, entitled the purchaser to rescind the contract.

In Eaton, Cole & Burnham Co. v. Avery, 83 N. Y. 34 (1880) it was decided that where a member of a firm makes to a mercantile agency statements known to him to be false, as to capital invested in the firm's business, with the intent that the statements shall be communicated to persons interested in ascertaining the pecuniary responsibility of the firm, designing thus to procure credit, and defraud such persons, and such statements are communicated to one who in reliance thereon sells goods to the firm upon credit, an action of deceit is maintainable against the partner making such false representations. This rule as more broadly stated, *i. e.*, a false statement to mercantile agencies as to one's financial condition is fraudulent as to persons who deal with him in reliance on such representations, has been generally followed. Genessee Saving Bank v. Barge Co., 52 Mich. 164 (1883); Fechheimer v. Baum, 37 Fed. 167 (1888); Stover & Abbott Mfg. Co. v. Coe, 49 Ill. App. 426 (1893); Bliss v. Sickles, 142 N. Y. 647 (1894); Triplett v. Rugby Distilling Co., 66 Ark. 219 (1899); Cox Shoe Co. v. Adams, 165 Ia. 402 (1898); Salisbury v. Barton, 63 Kan. 552 (1901); *In re* Weil, 111 Fed. 897 (1901); Courtenay v. Knable & Co. M'f'g Co., 97 Md. 499 (1903). The facts of these decisions concern sales to the person making the report to the agency and upon which reliance was placed by the vendors but in National Bank of Merrill v. Ill. & Wisconsin Lumber Co., 101 Wis. 247 (1898) the principle was extended to when a bank loaned money to a corporation in part on the faith of statements made by the latter to commercial agencies as to its financial condition.

But in the language of the court in the principal case, "it is not difficult to conceive that it would be to the interest of business concerns * * * to employ commercial agencies * * * to attract dealers in investments and investors themselves." Such seemed to be the situation in this case, and moreover by the evidence of the general custom of commercial agencies such statements are given to these agencies for the purpose of giving them to "inquirers." Of this class the plaintiff was one and the case is in line with the leading cases on the subject. Scott v. Dixon, 29 L. J. (Ex.) 62 and Peek v. Gurney, L. R., 6 App. 377.

INTOXICATING LIQUORS—UNLAWFUL SALES BY SERVANT OF DEFENDANT.—In the trial of a druggist for unlawfully selling intoxicating liquors, evidence of an illegal sale made in the absence of the defendant by his clerk was sufficient to support a conviction. Walters v. State, 92 N. E. 537 (Ind. 1910).

On its facts this case is in accord with the great weight of authority, construing statutes regulating the sale of intoxicating liquors. It is generally held, that the State makes out a *prima facie* case by evidence of an unlawful sale made by a servant of the defendant. Comm. v. Briant, 142 Mass. 436 (1886); Rooney v. Augusta, 117 Ga. 709 (1903); Anderson v. State, 22 Ohio 305 (1872). *Contra*, requiring prosecution to show affirmatively that the principal knew and consented to his agent's acts, Sweeney v. State, 91 S. W. 575 (Tex. 1906).

The cases are irreconcilable on the point involved in this case, namely, whether the proprietor is criminally liable for all unlawful sales made by his servant, although expressly forbidden. Some cases hold that the intent of the Legislature is to require the principal at his peril to see that no unlawful sales are made in his establishment. He can escape liability only by employing trustworthy servants. Carrol v. State, 63 Md. 551 (1885); Noecher v. People, 91 Ill. 494. Other cases require that the acquiescence of the proprietor be established at least circumstantially. The owner was

absolutely liable for selling to minors in State v. Kittelle, 110 N. C. 560 (1892); *contra*, Comm. v. Stevens, 153 Mass. 421 (1891); for sales to habitual drunkards, Comm. v. Uhrig, 138 Mass. 492 (1885); *contra*, People v. Parks, 49 Mich. 333 (1882); and for sales by druggists' clerks, People v. Longwell, 120 Mich. 310 (1899); *contra*, U. S. v. White, 42 Fed. 138 (1890) [*syllabus* misleading].

The different wording of the statutes construed by the courts of the various states does not account for the difference in results appearing in the cases. Compare Ind. Acts, 1895, p. 248, c. 127, § 9½, applied in principal case; Pa. Act of May 13, 1887, P. L. 108, § 16, applied in Comm. v. Johnston, 2 Pa. Super. Ct. 317 (1896); and Mo. Laws, 1883, p. 90, § 2, as applied in State v. McGrath, 73 Mo. 181 (1880).

LANDLORD AND TENANT—DISTRESS—THIRD PERSON'S PLEA OF EXEMPTIONS LAWS.—A husband executed a lease in writing for a house and lot, waiving the benefit of all exemption laws. The landlord issued a distress warrant for rent in arrear on which goods of the tenant's wife were distrained. It was held, in a suit by the wife against the landlord, that she was not entitled to the benefit of the exemption for debtors under the Act of April 9, 1849, P. L. 533. Swaney v. Doumont, 44 Pa. Super. Ct. 49 (1910).

The Act of 1849, *supra*, enacted that "property to the value of three hundred dollars, exclusive of all wearing apparel of the defendant and his family * * * and no more, owned by, or in the possession of any debtor, shall be exempt from levy and sale on execution, or by distress for rent."

The Supreme Court of Pennsylvania has decided that under this statute a subtenant or assignee of a tenant, who has not been recognized as such by the landlord, cannot claim the benefit of the exemption law as against a distress for rent. Rosenberger v. Hallowell, 35 Pa. 369 (1860). The decision in that case went on the ground that neither the relation of landlord and tenant, nor that of debtor and creditor exists between the landlord and such assignee. Exactly the same reasoning was applied as between the tenant's wife and the landlord in Swaney v. Doumont, *supra*. It follows that the wife's goods are in no better position than those of a stranger which are found upon the premises, and have been declared subject to distress both at common law and under the Pennsylvania Act of March 1, 1772. Kessler v. McConachy, 1 Rawle 435 (1829).

The wife would seem, however, not to be without a remedy. The eleventh section of the Act of 1850 gives a married woman the right to have a trustee appointed to recover and take care of her separate property. And a tenant on whose premises a stranger's property is seized for rent, is liable over to the stranger. O'Donnel v. Seybert, 13 S. & R. (Pa.) 54 (1825). There is no reason, therefore, why a wife, by her trustee, should not, in an action against her husband, be able to recover for property seized on a distress warrant for rent against her husband.

The principal case overrules earlier adjudications at common pleas, Balmer v. Peiffer, 16 Lanc. L. R. 251 (1899).

LANDLORD AND TENANT—CLAIM FOR RENT IN BANKRUPTCY.—*In re* Roth & Appel, 181 Fed. 667 (1910) the Court held that a covenant to pay rent creates no debt until the time stipulated for the payment arrives, and therefore rent accruing under a lease after the filing of a petition in bankruptcy against the lessee is not provable against his estate as "a fixed liability * * * absolutely owing at the time of the filing of the petition within the meaning of Bankruptcy Act July 1, 1898."

All decisions, with the exception of a few in Pennsylvania, seem to agree that rent to accrue in the future is not a provable debt. *In re* Mahler, 105 Fed. 428 (1900); Bray v. Cobb, 100 Fed. 270 (1900); Atkins v. Wilcox, 105 Fed. 595 (1900); *In re* Ells., 98 Fed. 967 (1900); *In re* Hays, 117 Fed. 879 (1902); Lamson Consol. Store Service Co. v. Bowland, 114 Fed. 639 (1902);

In re Mitchell, 116 Fed. 87 (1902); Watson v. Merrill, 136 Fed. 359 (1905); *In re* Rubel, 166 Fed. 131 (1908); Loveland Bankruptcy, 3rd Ed. 365, Collier Bankruptcy, 7th Ed. 720.

These authorities are not in accord on the method of reasoning by which the conclusion is reached. Some hold that an adjudication destroys the relation of landlord and tenant and practically annuls the lease. *In re* Jefferson, *supra; In re* Hays, *supra;* Bray v. Cobb, *supra,* based on decisions of Bailey v. Loeb, 2 Fed. Cas. 376 (1875); *In re* Webb, 29 Fed. Cas. 494; *In re* Breck, 4 Fed. Cas. 43 (1875).

Others hold that the debt not being provable in bankruptcy, as before the day at which the rent is covenanted to be paid, it is in no sense a debt, it is not affected by the discharge. The bankrupt remains bound by his covenant but the trustee is not and may adopt the lease within a reasonable time or ignore it entirely, but it is not terminated by an adjudication. This view, founded on the decision in *ex parte* Houghton, Fed. Cas. 6,725 (1871), seems to be supported by the weight of authority. *In re* Mitchell, *supra;* Watson v. Merrill, *supra; In re* Ells., *supra; In re* Mahler, *supra.* In Atkins v. Wilcox, *supra,* the rent covenanted to be paid at times subsequent to the filing of the petition did not constitute a provable claim but the court avoided deciding the question of the termination of the lease.

In Pennsylvania a landlord is entitled out of the proceeds of personal property upon the demised premises in the hands of a receiver or trustee in bankruptcy, under the Bankruptcy Law of March 2, 1867, to priority of payment of rent due at the time of filing the petition, not exceeding one year as upon an execution. Platt, *et al.* v. Johnson, *et al.,* 168 Pa. 47 (1895); Tenfal v. Rowan, 179 Pa. 408 (1897). The same principle has been followed under the Bankrupt Act of July 1, 1898. *In re* Gerson & Dist. Rep. 277 (1899). It is immaterial that only a small amount had accrued before the bankruptcy where the lease for years contains an agreement by the lessee that if he should become bankrupt during the term the whole rent for the unexpired term should at once become due and collectible. The claim, however, was only allowed for one year. *In re* Goldstein v. Am. Banker, Rep. 603 (1899). This departure in Pennsylvania from the generally accepted law can be traced directly to the interpretation of Act of June 16th, 1836. Purdon's Dig. Ed. 1873, 879; in Longstreth v. Pennock, 87 U. S. 575 (1874).

LARCENY—TORTIOUS TAKING AND SUBSEQUENT FELONIOUS CONVERSION.—In Wilson v. State, 131 S. W. 336 (Ark. 1910), on an indictment for larceny it appeared that the prisoner took a bull out of a range thinking it his own, and kept it for some time in his own pasture. Subsequently he discovered the mistake but converted the bull with felonious intent. The court held this could not constitute larceny because the felonious intent did not exist at the time of the taking. This conclusion was arrived at through the drawing of a distinction that appears unsound. The court mentioned the well known rule that where the taking is tortious, as every act under it is a trespass a subsequent conversion *animus furandi* is larceny, but refused to bring this case within the rule. McCullock, C. J.: "Conceding that this is the correct rule it cannot be extended so as to apply to one who took property in good faith under an honest belief of ownership, for in this there is no element of willful trespass even though there be a subsequent conversion with knowledge of the true ownership."

Assuming that by "willful trespass" is meant "willfully wrongful trespass" it may be said that there is no sound ground for such a limitation to the rule in question. Trover, like trespass, is a possessory action, and moral delict is not necessary to give rise to a right to bring it. The taking of the bull was beyond question tortious and when the felonious conversion followed the crime of larceny was complete. Clark and Marshall, Law of Crimes, § 320; Bishop's New Criminal Law, 8th Ed. II, § 839; Regina and Riley, 6 Cox, C. C. 88.

The cases cited to sustain the decision in the principal case do not seem

to support it. With one exception they are cases of subsequent felonious conversion of property by a finder. In the one case in point the court wholly overlooked the rule discussed.

MASTER AND SERVANT—SAFE PLACE TO WORK—INSPECTION BY STATE LICENSE EXPERT.—Under an Illinois statute requiring the employment of a legally qualified mine examiner to inspect the mine each day before the men were permitted to enter and to see that all dangerous places are properly marked, a mine owner cannot avoid a liability which would otherwise be his because the mine examiner inspected a dangerous place the morning of the occurrence and in good faith believed it was safe. Aetitus v. Spring Valley Coal Co., 92 N. E. 579 (Ill. 1910).

The mere fact that statutes require certain employees to be licensed thereby limiting the employer's field of selection, does not prevent such employee from being a servant for whose negligence the master is liable. Martin v. Temperley, 4 Q. B. 298 (1843). But these statutes go further. The duties imposed at common law on the employer to provide a safe place to work are entrusted to this state certified servant. Yet it has been very generally held the master may not escape liability on proof that the injury resulted from the negligence of a servant, who was entrusted with the duty of providing a safe working place. Colorado Coal Co. v. Lamb, 6 Col. App. 255 (1895); Hough v. Railway Co., 100 U. S. 213 (1879); Coal Co. v. Young, 117 Ind. 520 (1888). Some states, however, have held that the master is relieved on the ground that the mine boss is a creature of the legislature, selected by the mine-owner in obedience to the commands of the law and in the interest and protection of the mines themselves; that as such he is a fellow servant of the injured employee. Colo. Coal Co. v. Lamb, *supra;* Williams v. Thacker Coal Co., 44 W. Va. 599 (1898); Del. & Hudson Canal Co. v. Carroll, 89 Pa. 374 (1879); Redstone Coke Co. v. Roby, 115 Pa. 364 (1886). And see Durkin v. Kingston Coal Co., 171 Pa. 193 (1895) where that part of an act making the owner liable for the negligence of such foremen was declared unconstitutional.

It is submitted that the gist of the action is not the failure to employ a competent mine boss, but grows out of the failure of the employer to discharge the duties resting on him in relation to providing a safe working place for his servants. Employing a foreman prescribed by statute should not be enough to relieve him from such liability. Sommer v. Carbon Hill Coal Co., 32 C. C. A. 156 (1898); Schmalstieg v. Leavenworth Coal Co., 65 Kan. 753 (1902); Antioch Coal Co. v. Rockey, 82 N. E. 76 (Ind., 1907); Smith v. Dayton Coal Co., 115 Tenn. 543 (1905). But see Sale Creek Coal Co. v. Priddy, 96 S. W. 610 (Tenn. 1906) where the statute confers on the certified foreman control of the mine, independent of the mine-owner.

The principal case is in line with the earlier Illinois decision, Catlett v. Young, 143 Ill. 74 (1892); Odin Coal Co. v. Denmon, 185 Ill. 413 (1900); Merteus v. Southern Coal Co., 235 Ill. 540 (1908); in holding that good faith does not excuse, and that the question of whether the place was dangerous is for the jury. This rule makes operators absolute insurers of the safety of their mines; and yet it would seem that the operator fulfills his duty to his employer, if he commits this examination to careful and skillful bosses who conduct the same to the best of their skill and ability. Waddell v. Simoson, 112 Pa. 567 (1886); Hughes v. Improvement Co., 20 Wash. 294 (1898).

MASTER AND SERVANT—ASSUMPTION OF RISK.—In Poli v. Nama Black Coal Co., 127 N. W. 1105 (Ia.) Oct. 26, 1910, the plaintiff was injured through defendant's breach of a statutory duty in failing to provide proper covering for the cages in the shafts. The defence of assumption of risk was interposed. Weaver, J.: "Notwithstanding the absolute liberty with which every individual is legally endowed to enter into contract for his personal labor or service and his equal legal right to abandon such service at any time subject

only to liability for damages in case such act be not justified, it is nevertheless true in practical life that poverty, scarcity of employment, dependent family and other circumstances often impose moral compulsion upon the laborer to accept employment upon such terms and under such conditions as are offered him, and it is in recognition of this fact, as well as the further facts, that society has a direct interest in preserving the lives and promoting the well being of all persons engaged in productive industry that laws have been enacted to protect them against unnecessary hazard of injury by failure of employers to exercise proper care for their safety. To say that the legislature in enacting these measures of protection which in some degree equalize the advantages of employer and employee and afford a needed protection to the persons and lives of the latter intended that a master might violate the statute to the injury or death of his servant and then escape liability by pleading and proving that his offence against the law was habitual, obstinate and notorious is inconsistent with justice and it is hardly extravagant to say repugnant to good morals. Such a rule offers a premium to contemptuous disregard of the statute and robs it substantially of all value to the class in whose interest it was enacted."

The two cases which have caused such an even split of authority on this question are St. Louis Cordage Co. v. Miller, 126 Fed. 495, 1903, and Noramore v. Cleveland, C. C. & St. L. Rwy. C., 96 Fed. 298, 1809. The former proceeds on the theory that the statutory duty of protection imposes no greater obligation than the common law duty and if the servant is willing and able to waive the latter, why should he not be allowed to waive the former as well? The other viewpoint is that the duty is not an individual one with the performance of which the servant may dispose if he so desires but a social one, a breach of which is against the State itself. In following one or the other of these decisions, the courts are very evenly divided.

The majority of decisions seem to favor the Narramore case. Kirby v. Manufacturers' Coal & Coke Assn., 127 Mo. App. 588, 1907. M. K. & T. Rwy. v. Goss, 31 Tex. Civ. App. 300, 1903. Camp v Chic. & Gt. West. R. R., 124 Ia. 238, 1904. Swick v. Portland Cement Co., 147 Mich. 454, 1907. Moore v. Centralia Coal Co., 140 Ill. App. 291, 1908. Valjajd v. Carnegie Steel Co., 226 Pa. 314, 1910. Johnson v. Far West Lumber Co., 47 Wash. 492, 1907. Kansas M'f'g Co. v. Stark, 77 Kan. 648, 1908. Hailey v. Tex. & P. R. Co., 113 La. 533, 1904. Paul M'f'g Co. v. Racine, Adin, 43 Ind. App. 695, 1909. Beiterly v. B. G. & A. R. R., 159 Mich. 385, 1909; Kilpatrick v. Grand Trunk Rwy., 74 Vt. 288, 1902. Johnson v. Coal Co., 114 S. W. 722. Lind v. Uniform Stave & Package Co., 120 N. W. 839 (Wis.).

The following jurisdictions hold the contrary view supporting the St. Louis Cordage Case. Linoleum v. Rice, 202 Mass. 82, 1909. Cleveland. & East R. R. v. Somers, 24 Ohio, C. C. 67, 1902. Kase v. Minn. St. P. & L. M. Rwy., 107 Minn. 260, 1909. Walker v. Simmons M'f'g Co., 131 Wis. 547, 1907. Denver R. R. v. Lannon, 40 Colo. 195, 1907. Mika v. Passaic Point Wks., 76 N. I. L. 561, 1908. Since the passage of the Employers Liability Act in New York (Laws, 1902, Chap. 600 No. 3), assumption of risk is made a question for the jury, Kiernan v. Eidlitz, 109 App. Div. 726, 1905.

In the Federal courts it would seem that assumption of risk is not available as a defence in case of the infraction of a Federal statute. Bolan Darnell Coal Co. v. Williams, 104 S. W. 867, (Ind. Terr.). In actions based on the violation of a State statute, the courts should follow the interpretation given to the statute by the court of the state in which it was enacted. Inland Steel Co. v. Kachwinski, 151 Fed. 219, 1907. Welsh v. Barber Asphalt Paving Co., 167 Fed. 465 (1909), but such has not always been the policy. St. Louis Cordage Co. v. Miller, *supra*.

As a general rule, it would seem that the courts are now tending toward the Narramore doctrine, largely on the ground indicated in that decision and on that given in the principal case.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT.—The Laws of 1910, ch. 674, of the State of New York, provide in substance that—If, in the course of certain dangerous occupations, personal injury to a workman by accident arising out of and in the course of the employment is in whole or part caused by (1) a necessary risk or danger of the employment, or one inherent in the nature thereof, or (2) a failure of the employer or any of his or its agents, officers or employees to exercise due care or comply with any law affecting such employment, then such employer shall, subject to certain exceptions, be liable to pay compensation.

In Ives v. South Buffalo Ry Y. Co., 124 N. Y. S. 926 (1910), decided in the Supreme Court of the State, the plaintiff brought himself squarely within the provisions of the act by alleging facts that established as admitted by the answer, that while employed by the defendant, as a switchman, he was injured in the prosecution of his work, without negligence on the part of the defendant and "without serious or wilful misconduct" on his part, but solely by reason of a necessary risk or danger of his employment or one inherent in the nature thereof. The defendant maintained that the legislature had exceeded its power in passing this act for the reasons that it deprives the defendant of liberty and property without due process of law, and denies it the equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States, and Article 1, Paragraph 6 of the Constitution of New York State. The court, in holding the act constitutional, observed, "The common law imposed upon the employee entire responsibility for injuries arising out of the necessary risks and dangers of the employment. The statute before us merely shifts such liability upon the employer. That the legislature has the power to deal with the question of employers' liability on a basis other than fault is not clear beyond peradventure, but every presumption is in favor of the constitutionality of the act, nor do I find its constitutionality so doubtful as to warrant this court in holding that such action is not within the constitutional powers of the legislature."

This act is plainly based on the Workmen's Compensation Act of England 6 Edw. VII C. 58, and goes a step beyond any of the so-called "socialistic" legislation in this country up to the present time. The employers' Liability Act of 1908 imposed no liability where there was no negligence on the part of the company, its servants or agents. Statutes in the several States consistent with this act have been adopted, and generally speaking have: (1) abolished the fellow-servant rule and assumption of risk doctrine in certain employments; (2) instituted the comparative negligence rule, and (3) made railroads absolutely liable for injuries to passengers who have not been guilty of gross negligence. These acts have been held constitutional.

The New York statute, however, imposes a liability independent of the master's negligence, and it is hardly probable that the question of its constitutionality will be permitted to rest upon the decision of an intermediate lower court of appeal. As to the expediency of such legislation, an address by Mr. Floyd R. Mechem before the Illinois State Bar Association, 4 Ill. L. R. 243, contains valuable suggestions. He points out that legislation affecting the relation of employer and employee must, in general, be State legislation, as Congress has no control over the matter, except in connection with interstate commerce; that uniform State legislation is difficult to secure; that much of the business to be affected is more than State wide in operation; and that such legislation must be under State constitutions and the Fourteenth Amendment, demanding due process and equal protection of the laws. Legislators in England and Germany do not meet with these difficulties. Mr. Mechem also objects to a liability law, and advocates a union of employer and employee in furnishing an adequate insurance in view of the exigencies of the employment, and an entire elimination of the question of legal liability, which he says is not likely to be settled to the satisfaction of either.

Interesting discussions along this line can be found in New York Bar Association Reports, Jan., 1910, Vol. 33, and the Journal of Political Economy, June, 1910, p. 465.

MASTER AND SERVANT—FOR SERVANT'S WILFUL INJURY TO TRESPASSERS.—The case of Penas v. Chicago, etc., Ry., 127 N. W. 926 (Minn., 1910) deals with the liability of a Railroad Company for the act of its brakemen in ejecting a trespasser from a train, and thereby injuring him. The opinion by Jaggard, J., is a voluminous but very instructive review of the liability of a master to third persons for the tort of his servant. Both the English and American doctrines are discussed, and their limitations, based on tradition rather than sound reasoning and logic, deprecated.

American judges have regarded the liability both from the view point of the master and of the person injured; they have emphasized, not so much the authority of the master as the duty imposed upon him to the person injured, which has been violated by the servant. In many cases the master is held liable, although the act is disapproved of or clearly forbidden by him. Singer Co. v. Rahn, 132 U. S. 518 (1889); although the motive of the servant was malicious or capricious. Dealy v. Coble, 112 App. Div. 296 (1906). The growing tendency is to get away from the tests of "scope of authority," "implied authority," and "course of employment," which are often fallacious and fictitious, but accord with surviving tradition. Liability may attach because the master has put in the servant's power an ability to do damage by means of instrumentalities dangerous intrinsically or potentially. The employer cannot escape liability because the wrong was beyond the scope of the servant's authority. R. R. v. Scoville, 62 Fed. 730 (1894); R. R. v. Shields, 47 Ohio 387 (1890). The liability is recognized in the master largely because he has put it within the power of the servant to inflict harm by investing him with means or putting him in positions, innocent enough in themselves. See Kline v. R. R., 37 Cal. 400 (1869), the facts of which are similar to the principal case. While the language of authority is often used to describe the liability of the master under these circumstances, it is strained to meet the conclusion which the court has reached by independent reasoning. Romell v. R. R., 68 N. H. 358 (1895); and as in the leading case of Rounds v. R. R., 64 N. Y. 129 (1876), where the court wrestles with the doctrine of authority, but finally rests the master's liability upon the violation by the servant of the master's negative duty to abstain from willful violence.

"The test of liability should be determined primarily by the reason the law assigns, and not by incidental or collateral circumstances, to be consistent with tradition." In this case the test advanced was the violation by the servant of the duty to abstain from willful harm owed by the defendant to the plaintiff.

PRINCIPAL AND SURETY—GUARANTY—NOTICE OF ACCEPTANCE—WHEN REQUIRED.—In a case recently decided in South Carolina one of the questions raised was whether the defendant could be held on a guaranty that he would see plaintiff paid for any goods supplied to a certain company, this being written in answer to a request for such a guaranty, but plaintiff not having notified defendant of his acceptance of same, though he did supply the goods to the company. The court decided in favor of the plaintiff. J. L. Mott Iron Works v. Clark, 69 S. E. 227 (S. C., 1910).

The basis of the decision was that when the guarantee requests the guarantor to make guaranty, and the latter does so, "the minds of the parties have met, and there is no reason for further notice." In other words, the request for a guaranty is, in effect, to be twisted into an offer, and the promise of the guarantor into an acceptance. This precise question has not been presented very often, though it is doubtful whether any real distinction should be drawn between such a case and one where the guaranty was not made on request. However, such a position has been taken in two cases decided by the Supreme Court of the United States and cited in the present case, though the statements in both are dicta. Davis v. Wells, 104 U. S. 159 (1881); Davis Sewing Machine Co. v. Richards, 115 U. S. 524 (1885). In Pennsylvania notice of acceptance is required whether the guaranty is in answer to a previous request, or an offer itself, and the dicta of the two U. S. cases above quoted are referred to as unconvincing as well as *contra* to

the doctrine already established in this State, Evans v. McCormick, 167 Pa. 247 (1895). It is submitted that the position of the Pennsylvania court is more consistent than that taken in the present case, though it may be doubted whether the doctrine requiring notice of acceptance is in any case well founded. It is supported by the weight of authority, however, though the jurisdictions base their conclusions on different grounds. For a good discussion of the whole question see 5 Columbia Law Rev. 215.

SALE OF GOODS BY DESCRIPTION—IMPLIED WARRANTY—ENGLISH SALE OF GOODS ACT.—The defendants, as wholesalers, sold to the plaintiffs, retailers, certain seed described as "common English sainfoin" seed, but which was in reality "giant sainfoin" seed, an inferior variety, under a contract whereby the sellers gave "no warranty, express or implied, as to growth, description, or any other matters." The plaintiffs sought to recover damages, they having recompensed their sub venders for the failure of the crops. *Held:* The defendants were protected by the clause in the contract from any claim for damages for breach of warranty. Wallis, Son & Wells v. Pratt & Haines, 103 Law Times 118 (1910).

Where vendor sells goods by a particular description, it is a condition precedent to his right of action that the thing he offers to deliver, or has delivered, should answer the description. Varley v. Whipp, 1 Q. B. 513 (1910); Columbian Iron Works v. Douglas, 84 Md. 44 (1896). When the goods have been so dealt with as to make their return by the vendee impossible the condition ceases to be available as a condition and may be converted into a warranty, for breach of which recovery must be sought in damages. Bentsen v. Taylor, Sons & Co., 2 Q. B. 274 (1893); Wolcott v. Mount, 36 N. J. L. 262 (1873); Morse v. Union Stock Yards, 21 Or. 289 (1891).

This doctrine has been incorporated in the English Sale of Goods, Act 1893, § 11, 1. c. The American Uniform Sales Act, calls the condition that the goods shall correspond to the description an implied warranty (§ 14). Since, however, under this act, a breach of warranty justifies rejection of the goods, or an action for damages if goods are retained (§ 69) this difference in Terminology makes no difference in the remedy.

Cases adjudging the doctrine of implied warranty of identity are uniformly those in which the failure of the article to answer the buyer's demand is not evident on inspection. The following cases where the vendee of an inferior variety of seed has been permitted to recover full damages are typical. White v. Miller, 71 N. Y. 118 (1877); Shaw v. Smith, 45 Kas. 334 (1891); Edgar v. Breck & Sons, 172 Mass. 581 (1899); Hoffman v. Dixon, 105 Wis. 315 (1900); *contra*, Shisler v. Baxter, 109 Pa. 443 (1885). This last case may be distinguished on its facts, the buyer really got what he bargained for. There is a dictum in accord with the general authority in Fogel v. Brubaker, 122 Pa. 7 (1888).

TORT—LIABILITY OF CHARITABLE INSTITUTION.—A workman, employed thereon, was injured by reason of the defective condition of the premises of the Salvation Army. The latter sought to escape liability on the ground that it was a charitable institution, and that for the negligence of its agents and servants the rule of respondent superior did not apply. *Held:* The plaintiff could recover. Holdein v. Salvation Army, 92 N. E. Rep. 626 (1910).

For the "Trust Fund Theory" of exemption of charitable institutions from tort liability, see 58 University of Pennsylvania Law Review, 428, April, (1910).

WILLS—CREDIBLE AND DISINTERESTED WITNESSES UNDER THE PENNSYLVANIA ACT OF APRIL 26, 1855.—In Jeanes' Estate, 228 Pa. 537 (1910), the next of kin sought to defeat certain charitable bequests in the will of the testatrix on the ground that one of the witnesses is not credible and disinterested

under the Act of April 26, 1855, P. L. 332. The will named the Pennsylvania Company for Insurances on Lives and Granting Annuities as executor and also as trustee to hold certain shares of its own stock in trust for the charities in question. The witness in question was an officer and stockholder of the company. *Held:* He was not a party of such interest as to be an invalid attesting witness under the act.

This decision does away with the uncertainty caused by the decision in Kessler's Estate, 221 Pa. 314 (1908). In that case the subscribing witness, in addition to being named as executor and trustee was an officer of the church to which part of the income and ultimately a portion of the corpus of the trust estate was directed to go. The witness was held interested and the opinion severely criticised an earlier line of cases under the act, *e. g.*, Jordan's Estate, 161 Pa. 343 (1894), which had held an executor credible and disinterested, on the ground that that conclusion was reached on the unsound theory that an executor's interest was uncertain, remote, and contingent, and not such a certain and vested interest as intended by the act. The court in Kessler's Estate pointed out that an executor's interest is not more contingent than that of any legatee or devisee.

Jeanes' Estate, however, affirming Jordan's Estate, and applies its reasoning to the services of a trustee as well as an executor, being careful to point out, however, that the real basis of that reasoning is not the contingent quality of the interest, but the fact that commissions paid to executors and trustees are mere compensation for services rendered. This limits the decision in Kessler's Estate to the proportion that an administrative officer of the charity in question is an interested witness under the act.

It may be noted that the small proportion of the trustee's commission which would fall to the witness did not rule Jeanes' Estate. The court said: "The amount of his interest would be immaterial, for the doctrine, *de minimis non curat lex* has no application. The test is not quantity but quality."